IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

	:	**CIVIL ACTION**
THE AUTOMOBILE INSURANCE COMPANY OF HARTFORD,	:	
Plaintiff,	:	
v.	:	
LARRY MORRIS, a Minor, by his Parents and Natural Guardians, DELMER L. MORRIS, JR., and DIANE C. MORRIS, and DELMER L. MORRIS, JR. and DIANE C. MORRIS, in their own right, and	:	
STEVEN ANDERSON, a Minor, by his Parent and Natural Guardian, JUNE LISZEWSKI, and JUNE LISZEWSKI, in her own right,	:	
Defendants.	:	**NO. 97-5372**

M E M O R A N D U M

Reed, J. **March 22, 1999**

Before the Court is the motion of plaintiff The Automobile Insurance Company of Hartford ("AICH") for summary judgment on its claim for declaratory judgment that it has no duty to defend or indemnify defendants Steven Anderson ("Anderson") and June Liszewski ("Liszewski") in litigation that is currently pending against them. The Court has diversity jurisdiction under 28 U.S.C. § 1332. For the reasons that follow, the motion will be granted.

I. BACKGROUND

In August of 1995, the defendant Larry Morris and his parents, Delmer L. Morris, Jr. and Diane C. Morris ("the Morrises") filed a complaint in the Court of Common Pleas of Bucks

County against, among others, Anderson and Liszewski. The Morrises allege in that complaint that on November 19, 1994, Larry Morris "was attacked, assaulted and physically beaten by a group of assailants or attackers," including Anderson, and that Anderson and other minor defendants in that case "engaged, participated and acted in concert and in agreement with either [sic] for the purpose of causing and bringing about both physical injuries and other type of injuries" to Larry Morris. (Bucks County Complaint ¶¶ 11). In Counts V and VII of the Bucks County complaint, the Morrises allege claims against Anderson, averring that "as a result of the malicious, wanton, reckless, and deliberate conduct of minor defendant Steven Anderson's participation and active role or engagement in the malicious beating, striking, kicking, hitting, and assaulting of minor plaintiff, as aforesaid, the latter has suffered multiple serious permanent and disabling injuries and losses," including medical expenses and emotional distress. (Complaint ¶¶ 25, 29, 30). In Counts VI and VIII, the Morrises allege claims against June Liszewski (erroneously identified as June Anderson in the complaint), averring that she

> acted negligently, carelessly, and recklessly with regard to minor plaintiff Larry Morris and the injuries and losses suffered by this minor plaintiff as the result of the assault and beating inflicted upon him by her minor child, namely Steven Anderson, on November 19, 1994 by virtue of and by reason of the following in that she: (a) failed to dissuade or prevent her son from his announced, declared, or professed plan or intention to participate in a common scheme, agreement, or conspiracy with others . . . to assault, injure, and beat minor plaintiff Larry Morris as is set forth in Count I; or (b) failed to instruct or order her minor son either not to be in the company of others who had announced, declared or professed his/their plan or intention to participate in a common scheme, agreement, or conspiracy to assault, injure, and beat minor plaintiff Larry Morris; or not to participate in any attack, beating, or conduct either intended to or likely to cause physical injury to minor plaintiff Larry Morris; or (c) failed to regulate, control, supervise minor defendant especially on November 19, 1994 at the place aforesaid as set forth in Count I above.

(Complaint ¶¶ 27, 31).

The Morrises filed a separate complaint in the Eastern District of Pennsylvania alleging claims arising from the alleged attack on Larry Morris against Dan Lenihan, Bristol Township Police Department and Bristol Township Municipal Government under 42 U.S.C. § 1983. The Morrises allege in the federal complaint that Larry Morris "was the victim of a savage and brutal beating inflicted upon him by four (4) juveniles." (Federal Complaint ¶ 13).

The defendants in the federal action filed a third party complaint against the defendants in the Bucks County action, including Anderson and Liszewski, alleging that Anderson was jointly and severally liable for the injuries caused by the physical beating of Larry Morris and that Liszewski "negligently failed to properly supervise and/or control Stephen Anderson and/or otherwise negligently failed to use due care in exercising proper parental control over Stephen Anderson by permitting him to assault and batter minor plaintiff." (Third Party Complaint ¶¶ 11, 12, 18). The third party plaintiffs incorporate the allegations of the federal complaint by reference into the third party complaint. (Third Party Complaint ¶ 5). There is no allegation in the third party complaint that Anderson acted negligently or recklessly.

Anderson and Liszewski are insureds under a policy issued by AICH to Sherman Watts and Verna Scull. (Pl.'s Motion ¶¶ 4, 6). AICH is providing a defense to Liszewski pursuant to a reservation of rights, but it denied a defense and indemnity to Anderson. AICH instituted this lawsuit against the parties in the Bucks County action and the federal action[1] seeking a declaration that it has no duty to defend or indemnify Anderson or Liszewski.

[1] Only the Morrises, Anderson, and Liszewski remain as defendants in the declaratory judgment action; all other defendants stipulated to be bound by the result of this lawsuit and were dismissed from the case. (Document Nos. 29, 30, 31, 34).

II STANDARD FOR SUMMARY JUDGMENT

Rule 56(c) of the Federal Rules of Civil Procedure provides that "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law" then a motion for summary judgment must be granted.

The moving party has the initial burden of illustrating for the court the absence of a genuine issue of material fact. See Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986); Adickes v. S.H. Kress & Co., 398 U.S. 144, 159-161 (1970). Once the moving party has made a proper motion for summary judgment, the burden switches to the nonmoving party. Under Rule 56(e),

> [w]hen a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

The court is to take all of the evidence of the nonmoving party as true and to draw all reasonable inferences in his favor in determining if there is a genuine issue of material fact. See Adickes, 398 U.S. at 158-59. In order to establish that an issue is genuine, the nonmoving party must proffer evidence such that a reasonable jury could return a verdict in his favor. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248-49 (1986). A proper motion for summary judgment will not be defeated by merely colorable or insignificantly probative evidence. See id. at 249-50.

III. ANALYSIS

A. LANGUAGE OF THE POLICY

Section II of the policy under which Anderson and Liszewski are insured provides that:

> [i]f a claim is made or a suit is brought against any insured for damages because of bodily injury or property damages caused by an occurrence to which this coverage applies, even if the claim or suit is false, we will: a. pay up to our limit of liability for the damages for which the insured is legally liable. Damages include prejudgment interest awarded against the insured; and b. provide a defense at our expense by counsel of our choice, even if the suit is groundless, false or fraudulent.

(Policy at 17). The policy defines an "occurrence" as "an accident, including continuous or repeated exposure to substantially the same generally harmful conditions which results, during the policy period, in: a. bodily injury; or b. property damage." (Policy at 2). In addition, the coverage under the policy does not apply to bodily injury or property damage: "a. which is expected or intended by any insured, including bodily injury or property damage caused by or resulting from the intentional or reckless acts of any insured. This exclusion applies even if the resultant bodily injury or property damage is other than that exactly intended or expected by the insured." (Policy at 18 and Special Policy Provisions and Combination Endorsement).

B. ARGUMENTS OF THE PARTIES

In its motion for summary judgment, AICH argues that as a matter of law any injury sustained by Larry Morris was not a result of an "occurrence" as defined under the policy because the injury was "expected or intended" by Anderson and the result of his willful and malicious acts. As for its duties with respect to Liszewski, AICH argues that under the relevant exclusionary provision of the policy, even though the allegations in the underlying lawsuits against her sound in negligence, she is not covered because there was an intentional act by "any" insured, namely her co-insured, Anderson, which defeats coverage for all insureds under the policy. Thus, AICH argues that it is not obligated to defend or indemnify Anderson or

Liszewski.

In their response to the summary judgment motion, the Morrises argue that the motion for summary judgment should be denied as to the duty of AICH to defend or indemnify Anderson in the action in federal court because the third party complaint seeks contribution or indemnification from Anderson for any finding that the third party plaintiffs violated the constitutional rights of the Morrises, which would not require a finding of intent. Thus, the Morrises argue, the allegations of the third party complaint potentially bring the claim against Anderson within the policy coverage, and thus, AICH has a duty to defend him.

As for the coverage of Liszewski, the Morrises argue that even though the policy excludes coverage for intentional acts of "any insured," AICH is still under an obligation to defend and indemnify Liszewski as a co-insured; alternatively, the Morrises argue that the use of both "any insured" and "the insured" in the policy creates an ambiguity that should be construed against AICH. Finally, the Morrises argue that because the potential liability of Liszewski is not joint with her son, but rather, under Pennsylvania law, an independent basis of liability, the intentional acts of Anderson are irrelevant to determining the coverage of Liszewski.

In their response to the motion for summary judgment, Anderson and Liszewski argue that the harm sustained by Larry Morris was not expected or intended by Anderson. Citing to the deposition testimony of Larry Morris, Anderson and Liszewski argue that the extent of Anderson's involvement in the fight is not clear. Like the Morrises, Anderson and Liszewski argue that the exclusion of coverage for intentional acts of "any insured" is in violation of the reasonable expectations doctrine, in that the use of both "any insured" and "the insured" is ambiguous. Further, they argue that it is not clear whether the phrase "other than that exactly

intended or expected by the insured" refers to the actions of the insured or the injuries to the underlying plaintiff.

C. DETERMINATION OF AICH'S DUTY TO DEFEND OR INDEMNIFY

The parties agree that Pennsylvania law applies to the interpretation of the insurance policy and determination of AICH's obligations thereunder. AICH's duty to defend is determined by the allegations of the underlying lawsuit in light of the terms of the policy. See Gene's Restaurant, Inc. v. Nationwide Insurance Co., 548 A.2d 246, 246 (Pa. 1988); USAA v. Elitzky, 517 A.2d 982, 985 (Pa. Super. Ct. 1986).

> "An insurer's duty to defend an action against the insured is measured, in the first instance, by the allegations in the plaintiff's pleadings . . . .
> . . . .
> [I]n determining the duty to defend, the complaint claiming damages must be compared to the policy and a determination made as to whether, if the allegations are sustained, the insurer would be required to pay resulting judgment . . . the language of the policy and the allegations of the complaint must be construed together to determine the insurer's obligation."

Gene's Restaurant, 548 A.2d at 246-47 (quoting 7C J. Appleman, Insurance Law and Practice § 4683 at 42, 50 (W. Berdel ed. 1979)). "'It is not the actual details of the injury, but the nature of the claim which determines whether the insurer is required to defend.'" Donegal Mutual Insurance Co. v. Ferrara, 552 A.2d 699, 701 (Pa. Super. Ct. 1989) (quoting Springfield Township v. Indemnity Insurance Co. of North America, 64 A.2d 761 (Pa. 1949)).

The insurer must defend the entire action if any of the allegations in the underlying complaint may potentially fall within the area of coverage. See Agora Syndicate, Inc. v. Levin, 977 F. Supp. 713, 715 (E.D. Pa. 1997) (applying Pennsylvania law). "As long as the complaint

comprehends an injury which may be within the scope of the policy, the company must defend the insured until the insurer can confine the claim to a recovery that the policy does not cover." Elitzky, 517 A.2d at 985.

The interpretation of an insurance policy is governed by the rules of contract interpretation, that is, the terms of the policy must be given their ordinary meaning, a term is ambiguous only "'if reasonably intelligent men on considering it in the context of the entire policy would honestly differ as to its meaning,'" and "the parties' true intent must be determined not only from the language but from all the circumstances." Elitzky, 517 A.2d at 986 (quoting Erie Insurance Exchange v. Transamerica Insurance Co., 507 A.2d 389, 392 (Pa. Super. Ct. 1986)). In determining coverage under an insurance contract, the focus should be on the reasonable expectations of the insured and ambiguous provisions in an insurance policy should be construed in favor of the insured; however, an insured cannot complain that his expectations were frustrated if the policy is clear and unambiguous. See Britamco Underwriters, Inc. v. Grzeskiewicz, 639 A.2d 1208, 1210 (Pa. Super. Ct. 1994).

1. Determination of Coverage as to Anderson

To determine whether AICH has a duty to defend Anderson, the Court must determine if the underlying lawsuits involve an "occurrence" to which the policy applies. The policy defines "occurrence" as "an accident . . . which results . . . in bodily injury." The policy does not apply to bodily injury "which is expected or intended by any insured, including bodily injury . . . caused by or resulting from the intentional or reckless acts of any insured."

In Elitzky, the Superior Court of Pennsylvania held that as a matter of law, clauses that

exclude coverage for damage or injury "intended or expected" by the insured are ambiguous, and should be construed against the insurer. 517 A.2d at 987. The court held that for the purposes of insurance exclusionary clauses, the terms "intentional" or "expected" are synonymous. Id. at 991. Under Pennsylvania law, such an exclusionary clause applies "only when the insured intends to cause a harm," and not only if the insured's actions were intentional unless he also intended the resultant damages. Id. at 987. Coverage is not excluded even if the injury caused by the insured was reasonably foreseeable. Id. (citing Mohn v. American Casualty Co. of Reading, 326 A.2d 346 (Pa. 1974)). Coverage is excluded, however, if the insured "acted even though he was substantially certain that an injury generally similar to the harm which occurred would result." Id. at 991;see also Eisenman v. Hornberger, 264 A.2d 673 (Pa. 1970) (holding that such an "exclusion applies if the insured intended to cause a harm of the same general type as that which did occur" but that "intent" should not be construed to mean "specific intent to cause the precise injury which did occur"). The applicability of this reasoning is bolstered by the language of the policy which provides that "[t]his exclusion applies even if the resultant bodily injury . . . is other than that exactly intended or expected by the insured."

In the policy at issue in Gene's Restaurant, "occurrence" was defined as "an accident, including continuous or repeated exposure to conditions, which results in bodily injury or property damage neither expected nor intended from the standpoint of the insured." 548 A.2d at 247. The court held that the allegations in the underlying complaint of a willful and malicious assault constituted an intentional tort, and thus, the insurer had no duty to defend as such an act was not covered under the policy. Id. The court rejected the insured's argument that it did not "expect" or "intend" the injuries alleged in the complaint, noting that such an argument "ignores

the policy requisite that the 'occurrence' must be an accident which a malicious, willful assault and beating could never be." Id. at 247 n.1. The Gene's Restaurant court distinguished Elitzky on the ground that the court in Elitzky found that the insureds were entitled to coverage because the conduct alleged in the complaint could have been reckless as opposed to intentional. Id.

It is clear from the face of the Bucks county complaint that the allegations against Anderson are analogous to the allegations in Gene's Restaurant in that the Morrises claim that Anderson acted maliciously, wantonly, recklessly, and deliberately in his participation in the beating, striking, kicking, hitting, and assaulting of Larry Morris. Although the complaint contains an allegation that Anderson acted recklessly, this does not bring the allegations within the policy coverage for an occurrence because the policy explicitly excludes coverage for injury caused by or resulting from reckless acts. This Court concludes that while it is possible that Anderson did not intend the specific injuries that resulted to Larry Morris, according to the allegations of the complaint it is clear that Anderson intended or was substantially certain that an injury generally similar to the harm which occurred would result from his actions. See Federal Insurance Co. v. Potamkin, 961 F. Supp. 109, 111-112 (E.D. Pa. 1997) (granting summary judgment under Pennsylvania law to insurer in declaratory action on issue of its duty to defend or indemnify despite the inclusion of a count for negligence in the complaint because the facts in the complaint described intentional conduct) (citing cases); Donegal, 552 A.2d at 702 (rejecting insured's argument that the jury could find her conduct to be only negligent and holding that it was clear that the underlying complaint alleged that the insured intentionally kicked the plaintiff twice in the groin, and thus, the insured acted knowing the consequences of her act and that harm to the plaintiff would be substantially certain to result).

The third party complaint in the federal action incorporates by reference the allegations against Anderson from the federal complaint filed by the Morrises. In the federal complaint, the Morrises allege that Larry Morris was the victim of a savage and brutal beating. There are no allegations of negligence against Anderson by the Morrises or by the third party plaintiffs in the federal action; the allegations in those complaints are similar to the allegations of the Bucks County complaint, in that they describe Anderson's alleged involvement in an intentional physical attack on Larry Morris. Therefore, the allegations of the third party complaint in the federal action do not constitute an occurrence under the policy, and AICH has no duty to defend or indemnify Anderson in that lawsuit as well.

2. Determination of Coverage as to Liszewski

The defendants argue that under the reasoning of Nationwide Mutual Fire Insurance Company v. Pipher, 140 F.3d 222 (3d Cir. 1998), in which the underlying injury was alleged to be caused by the intentional act of a third party but attributable to the negligence of the insured, Liszewski is entitled to coverage for injuries from an occurrence because the Bucks County and federal complaints allege that the injury to the Morrises was negligently, not intentionally, caused from Liszewski's perspective. The Pipher court predicted that the Pennsylvania Supreme Court would hold that the test of whether injury is caused by an "accident" must be determined from the perspective from the insured, not the perspective of the third party. Indeed, taking the allegations of the underlying complaint from Liszewski's perspective, the injury to the Morrises was allegedly caused by her negligence.

However, AICH argues that Liszewski's coverage is excluded by another provision of the

policy. AICH argues that Liszewski is not covered under the policy because the phrases "which is expected or intended by any insured" and "resulting from the intentional or reckless acts of any insured" indicate that she is not covered under the policy because of the intentional or reckless acts of her son, Anderson, a co-insured. "Whether the intentional acts of a co-insured will defeat an 'innocent' co-insured's ability to collect or be indemnified under a policy has, for the most part, turned upon the exclusionary language used in the policy." General Accident Insurance Co. of America v. Allen, 708 A.2d 828, 832 (Pa. Super. Ct. 1998). Thus, coverage will be denied if the policy contains language that unambiguously excludes coverage regardless of whether the insured seeking coverage is the same insured who intended the injury. Id. at 832-33 (noting examples of such exclusionary policy language as that which was expected or intended by "any insured" or "an insured" and citing cases excluding coverage to innocent co-insureds under policies with this language); McAllister v. Millville Mutual Insurance Co., 640 A.2d 1283, 1284 (Pa. Super. Ct. 1994) (holding that the use of the terms "any" and "an" in the exclusions of the policy barred recovery by the innocent co-insureds).

The Morrises argument that the presence of the phrase "the insured" in the exclusionary provision of the policy creates an ambiguity is unconvincing. The exclusionary provision unambiguously provides, through the use of the phrase "any insured," that an innocent co-insured's coverage is defeated by the intentional acts of a co-insured. The argument of the Morrises that Liszewski is covered because the claims against her are based on a separate basis of liability and her potential liability is not joint with her son is also without merit. The determination of whether an innocent co-insured's coverage is defeated under this type of exclusion hinges on the terms of the policy, not on the basis of liability in the complaint.

This Court concludes that it is clear under the unambiguous terms of the policy and applicable Pennsylvania law that the policy excludes Liszewski's coverage because of the intentional, expected, or reckless acts of Anderson, as "any insured," even though the allegations against her sound only in negligence.

IV. CONCLUSION

Based on the foregoing, the Court concludes that AICH has no duty to defend or indemnify Anderson or Liszewski under the policy in connection with the actions pending in Bucks County Court of Common Pleas and the Eastern District of Pennsylvania arising from the alleged attack on Larry Morris. Accordingly, the motion will be granted.

An appropriate Order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

THE AUTOMOBILE INSURANCE COMPANY OF HARTFORD,	:	**CIVIL ACTION**
Plaintiff,	:	
v.	:	
LARRY MORRIS, a Minor, by his Parents and Natural Guardians, DELMER L. MORRIS, JR., and DIANE C. MORRIS, and DELMER L. MORRIS, JR. and DIANE C. MORRIS, in their own right, and	:	
STEVEN ANDERSON, a Minor, by his Parent and Natural Guardian, JUNE LISZEWSKI, and JUNE LISZEWSKI, in her own right,	:	
Defendants.	:	**NO. 97-5372**

O R D E R

AND NOW, this 22nd day of March, 1999, upon consideration of the motion of plaintiff The Automobile Insurance Company of Hartford for summary judgment (Document No. 32), the response by defendants Larry Morris, a Minor, by his Parents and Natural Guardians, Delmer L. Morris, Jr., and Diane C. Morris, and in their own right (Document No. 35), the response of defendants Steven Anderson, a Minor, by his Parent and Natural Guardian, June Liszewski, and in her own right, (Document No. 38), and the replies of the plaintiff (Document Nos. 36 and 39), and based on the reasons given in the foregoing Memorandum, having found and concluded that there is no genuine issue of material fact and that plaintiff is entitled to judgment as a matter of law pursuant to Federal Rule of Civil Procedure 56, it is hereby **ORDERED** that the motion is **GRANTED** and it is **DECLARED** that plaintiff has no duty under Policy No.

204SH12595288PCH to defend or indemnify Anderson or Liszewski in connection with the lawsuit pending at Civil Action No. 95-008173-18-8 in Bucks County Court of Common Pleas or the lawsuit pending in the United States District Court for the Eastern District of Pennsylvania at Civil Action No. 96-7590 arising from the November 19, 1994 alleged attack on Larry Morris.

This is a final Order. The clerk is directed to close this file.

LOWELL A. REED, JR., J.